

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ADRIAN ESPARZA</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,933
<b>TRAILMOBILE TRAILER, L.L.C.</b>	)	
Respondent	)	
AND	)	
	)	
<b>ZURICH U.S. INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the October 22, 2002 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on May 16, 2003. Stacy Parkinson of Olathe, Kansas, was appointed Board Member Pro Tem to serve in place of retired Board Member Gary M. Peterson.

**APPEARANCES**

Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Terry J. Malone of Dodge City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Decision. The record also includes the July 23, 2002 deposition transcript of George McNitt.

**ISSUES**

This is a claim for an April 27 or 28, 2000 accident in which claimant caught his head in a press. In the October 22, 2002 Decision, Judge Fuller determined claimant had a 53 percent whole body permanent functional impairment, which was higher than an average of claimant's task loss and wage loss percentages. Consequently, the Judge determined claimant was entitled to receive benefits for a 53 percent permanent partial general disability.

Claimant contends Judge Fuller erred. Claimant argues that he has a 69 percent task loss and a 100 percent wage loss. Claimant contends that he has made a good faith effort to find appropriate employment as he is presently going to vocational technical school trying to restore his ability to return to work. And claimant also argues that the 69 percent task loss opinion is the only valid task loss opinion in the record. Accordingly, claimant requests the Board to find that he has an 84.5 percent permanent partial general disability.

Conversely, respondent and its insurance carrier contend claimant's permanent partial general disability should be limited to his whole body functional impairment rating and, therefore, the Decision should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes, as follows:

The parties stipulated that on either April 27 or 28, 2000, claimant sustained personal injury by accident arising out of and in the course of employment with the respondent when he caught his head in a press. As a result of that accident, claimant sustained facial lacerations, facial fractures and brain injury.

#### **1. What is claimant's permanent functional impairment?**

In addition to other problems, claimant now has difficulty with his eyesight and hearing. By written stipulation, the parties introduced the medical reports of Dr. Samuel W. Amstutz and Dr. Richard J. Cummings, who are specialists in those areas. The parties also stipulated that the ratings provided by these two doctors were based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.).

In a May 8, 2001 letter, Dr. Cummings rated claimant as having a two percent whole person functional impairment due to binaural hearing impairment and a five percent whole person impairment due to equilibrium loss. The doctor wrote, in part:

As far as the ear and hearing is concerned, he has a 23% right ear impairment and a 0% left ear impairment for a 4% binaural hearing impairment. He has a 2% ear impairment from infection and the potential for further infections. He has a 5% impairment of [the] whole person because he has a class 2 equilibrium impairment. He belongs to this class because signs of vestibular disequilibrium are present with

supporting objective findings, but he can do the daily activities without assistance. This is a 5-7% impairment. The binaural hearing impairment of 6% equals a 2% impairment of the whole person. . . .

On the other hand, Dr. Amstutz rated claimant's whole body functional impairment due to visual field loss at 46 percent.

The parties also presented the testimony of claimant's expert medical witness, Dr. Pedro A. Murati, and the Judge's independent medical expert, Dr. George G. Flutter.

Dr. Murati examined claimant in April 2001 and diagnosed facial and nasal fractures, headaches, tinnitus and hearing loss, bilateral vision loss, neck sprain, facial scarring and trigeminal neuralgia. Using the *AMA Guides*, Dr. Murati initially rated claimant as having a 43 percent whole body functional impairment for vision loss, a two percent whole body functional impairment for the tinnitus in the right ear, a four percent whole body functional impairment for cervical sprain and a two percent whole body functional impairment for headaches, all of which combined for a 53 percent whole body functional impairment.

Dr. Murati did not initially rate claimant's impairment from the facial scarring or disfigurement, or mental impairment. But at his deposition, the doctor considered Dr. Flutter's ratings for those impairments, as indicated below, which increased claimant's whole body functional impairment rating from 53 percent to 57 percent.

Dr. Flutter examined claimant in January 2002 and concurred with the findings of Drs. Amstutz and Cummings. Using the *AMA Guides*, Dr. Flutter determined claimant had a five percent whole body functional impairment for scarring and disfigurement and a two percent whole body functional impairment for impaired mental status. When combining those impairment ratings with the impairment ratings determined by Drs. Amstutz and Cummings, Dr. Flutter initially rated claimant as having a 51 percent whole body functional impairment.

At his deposition, Dr. Flutter testified claimant probably had myofascial pain possibly due to a neck sprain that would comprise a five percent whole body functional impairment. Using the *AMA Guides* combined values chart and using the appropriate amount for the impairment for the neck, the Board finds Dr. Flutter's final functional impairment rating is 53 percent.

Considering the entire record, the Board affirms the Judge's finding that claimant sustained a 53 percent whole body functional impairment due to the April 2000 accident.

**2. What is claimant's wage loss for purposes of the permanent partial general disability formula?**

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*<sup>1</sup> and *Copeland*.<sup>2</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>3</sup>

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<sup>1</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>3</sup> *Id.* at 320.

The Kansas Court of Appeals in *Watson*<sup>4</sup> held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence.

After claimant was capable of returning to work, respondent provided him with accommodated work until approximately January 14, 2001, when he was laid off. Rather than conducting an extensive job search, claimant began attending school to become a mechanic. Although claimant is to be commended for his initiative, the law requires workers to prove that they have made a good faith effort to find appropriate employment before actual post-injury wages are used in the wage loss prong of the permanent partial general disability formula. And here, claimant has failed to satisfy that burden. Accordingly, for the period following claimant's layoff, a post-injury wage will be imputed to claimant based upon the entire record.

Respondent and its insurance carrier hired vocational expert Karen Crist Terrill to determine claimant's former job tasks. In a September 10, 2002 report to respondent and its insurance carrier's attorney, Ms. Terrill indicated that claimant retained the ability to earn approximately \$7 per hour despite his injuries.

In deciding this claim, the Judge imputed a post-injury wage based upon one-half of claimant's potential earnings after completing the basic auto mechanics courses. The record, however, indicates that due to claimant's injuries it is unlikely he would be able to perform the work of an auto mechanic or would be hired without taking more advanced courses that would train claimant to perform the less arduous task of diagnosing electrical and computer problems. According to claimant's vocational education instructor, mechanics with training and experience diagnosing electrical and computer problems are in demand and can earn from \$50,000 to \$70,000 per year.

For the wage loss prong of the permanent partial general disability formula, the Board concludes that claimant earned a comparable wage through January 14, 2001, when he was laid off. But after that date, the Board concludes that claimant's post-injury wage should be imputed based upon Ms. Terrill's opinion that claimant was able to earn approximately \$7 per hour, which equates to \$280 per week. Comparing claimant's stipulated pre-injury wage of \$686.74 per week to the post-injury wage of \$280 per week yields a 59 percent wage loss for the period commencing January 15, 2001.

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<sup>4</sup> *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

**3. What is claimant's task loss?**

The record contains the task loss opinions from two doctors. Dr. Flutter initially indicated that claimant should avoid working on ladders or at unprotected heights. The doctor also initially indicated that claimant should lift using appropriate techniques, as well as perform all activities with proper body mechanics. Nonetheless, at his deposition, Dr. Flutter testified that it probably would not be a bad idea to also restrict claimant from working around open machinery and power tools, along with restricting claimant from driving or operating heavy equipment.

At Dr. Flutter's deposition, claimant's attorney asked the doctor to review a list of former work tasks, which claimant's attorney represented claimant had performed in the 15-year period before the April 2000 accident and which had been prepared by labor market expert Jerry Hardin with input from claimant. Reviewing that task list, Dr. Flutter indicated that claimant had lost the ability to perform 14 of 45 total tasks, or approximately 31 percent.

On the other hand, Dr. Murati believed that claimant should be restricted from climbing ladders, crawling, working above his shoulders, lifting or carrying more than 35 pounds, working more than 24 inches away from the body, placing the neck in awkward positions, working more than four feet above the ground on unprotected heights, and working around dangerous machinery. But the doctor does believe that claimant can constantly lift up to 20 pounds and occasionally lift up to 35 pounds. Dr. Murati reviewed the same task list that Dr. Flutter reviewed, but coupled with information from claimant regarding which tasks were performed around dangerous machinery and which required claimant to place his neck in an awkward position, the doctor indicated that claimant should no longer perform 31 of the 45 total tasks, or approximately 69 percent. Additionally, claimant noted on the task list provided to Dr. Murati which tasks claimant believed were duplicates. Excluding those duplicates, Dr. Murati's opinion is that claimant should no longer perform 24 of 35 tasks, which is also approximately 69 percent.

The Board is not persuaded that either doctor's task loss opinion is more accurate than the other. Accordingly, the Board averages Dr. Flutter's 31 percent task loss opinion with Dr. Murati's 69 percent task loss opinion and the Board concludes claimant sustained a 50 percent task loss due to the April 2000 accident.

**4. What is claimant's permanent partial general disability?**

As indicated above, a worker's permanent partial general disability is an average of the worker's task and wage losses, or the worker's functional impairment rating, whichever is higher. Claimant's 50 percent task loss and 59 percent wage loss average 54.5 percent.

Consequently, claimant's permanent partial general disability is 53 percent before his January 14, 2001 layoff and 54.5 percent after that date.

The Board adopts the findings and conclusions set forth in the October 22, 2002 Decision to the extent they are not inconsistent with the above.

**AWARD**

**WHEREFORE**, the Board modifies the October 22, 2002 Decision and increases claimant's permanent partial general disability to 54.5 percent after January 14, 2001.

Adrian Esparza is granted compensation from Trailmobile Trailer, L.L.C., and its insurance carrier for an April 27, 2000 accident and resulting disability. Based upon an average weekly wage of \$686.74, Mr. Esparza is entitled to receive 12.57 weeks of temporary total disability benefits at \$383 per week, or \$4,814.31.

For the period ending January 14, 2001, Mr. Esparza is entitled to receive 24.86 weeks of permanent partial general disability benefits at \$383 per week, or \$9,521.38, for a 53 percent permanent partial general disability.

For the period commencing January 15, 2001, Mr. Esparza is entitled to receive 201.32 weeks of permanent partial general disability benefits at \$383 per week, or \$77,105.56, for a 54.5 percent permanent partial general disability and a total award of \$91,441.25.

As of June 10, 2003, Mr. Esparza is entitled to receive 12.57 weeks of temporary total disability compensation at \$383 per week in the sum of \$4,814.31, plus 150.15 weeks of permanent partial general disability compensation at \$383 per week in the sum of \$57,507.45, for a total due and owing of \$62,321.76, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$29,119.49 shall be paid at \$383 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Decision to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Brian D. Pistotnik, Attorney for Claimant  
       Terry J. Malone, Attorney for Respondent and its Insurance Carrier  
       Pamela J. Fuller, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director